IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11626 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DIPAKBHAI GOVINDBHAI PARMAR

Versus

COMMISSIONER OF POLICE FOR THE CITY OF AHMEDABAD

Appearance:

1. Special Civil Application No. 11626 of 2002

MR ANIL S DAVE for Petitioner No. 1

MR A.Y.KOGJIE AGP for Respondent No. 1-3

CORAM : MR.JUSTICE D.K.TRIVEDI

Date of decision: 19/05/2003

ORAL JUDGEMENT

#. The petitioner detenu has challenged the order of detention passed by the Commissioner of Police, Ahmedabad

City dated 2nd November, 2002 detaining the petitioner by resorting to the provisions of Subsection 1 of Section 3 of the Prevention of Antisocial Activities Act, 1985 (hereinafter referred as the "PASA Act") on several grounds and as per committal order dated 2nd November, 2002, the petitioner was ordered to be detained at Probandar Jail. The order of detention dated 2nd November, 2002 was executed on the detenu on the very day i.e. on 2nd November, 2002. The grounds of detention and the material relied upon by the Detaining Authority was also duly furnished to the detenu on the very day i.e. on 2nd November, 2002. As found from the grounds of detention, the Detaining Authority had considered the material placed before him, which shows that the petitioner detenu was involved in a prohibition case at Prohibition Station on 8th August, 2002 vide CR. No. 2545 of 2002 and the offences was for the offences under Sections 66 (1) (b), 65 (a)(e), 81, 116 (1) (b) of the Prohibition Act and in the said case, the accused was arrested by the police on 1.11.2002. In the said case, the police has seized 1232 bottles of foreign liquor and beer worth amounting to Rs.2,99,200=00 and one Mahindra Pick-up jeep worth Rs.4,00,000=00, mobile phone worth Rs.4000=00 and cash amount of Rs.220=00. The investigation of the said case also in progress at the time of passing the order of detention. The petitioner accused was arrested by the police in respect of that prohibition case registered on 8th August, 2002 on 1st November, 2002. The Detaining Authority has considered the material in the form of two statements of witnesses recorded by the Police Inspector, PCB on 31.10.2002 and 1.11.2002, which were verified by the Detaining Authority himself on 2.11.2002. The Detaining Authority had also on verification of the statements of the witnesses, claimed privilege by not disclosing names, addresses and identity of the witnesses in view of the apprehension expressed by the witnesses. In the statement of witnesses recorded by the police, they have disclosed about the incidents occurred on 20th September, 2002 and 30th September, 2002, where, the witnesses have experienced the prejudicial activities of the detenu and on particular day, because of such prejudicial activities of the detenu with his associates, had affected the public order in that area. The Detaining Authority has recorded satisfaction from the material, which were placed before him that the petitioner is a bootlegger within the meaning of Section 2 (b) of the PASA Act.

#. Mr. Dave, learned advocate for the petitioner has while arguing the matter, taken me through the petition and the documents attached to the petition namely the

order of detention, grounds of detention and the material relied upon by the Detaining Authority while passing the order of detention. Though several contentions were raised in the petition while challenging the order of detention, Mr. Dave has placed in service only one contention that the order of detention is passed mechanically as according to him that the Detaining Authority had relied upon the solitary case registered under the Prohibition Act and the Sponsoring Authority had while recording the statements of witnesses, disclosed about the incident, which the witnesses had experienced at the instance of the detenu, which has affected the public order in the area. It is his submission that the Detaining Authority has mechanically claimed privileged by not disclosing the names, addresses and identity of the witnesses under Section 9 (2) of the PASA Act. According to him that the Detaining Authority has verified the statements of both the witnesses on 2.11.2002 and on the very day, order of detention was issued detaining the petitioner as a bootlegger.

#. As found from the satisfaction recorded by the Detaining Authority, the Detaining Authority was satisfied on considering the material placed before him that the petitioner was a confirmed bootlegger and he is acting prejudicial to the maintenance of public order. The Detaining Authority has also further recorded that the detenu was released on bail and the petitioner is indulged in prejudicial activities, which is prejudicial to the public order and with a view to prevent such prejudicial activities, it was necessary to pass the order of detention as a last resort.

#. As found from the FIR dated 8th August, 2002, the case was registered under the Prohibition Act and the offences was registered against the unknown person. During the investigation of the said prohibition case, the police has recorded statements of witnesses and as per the statement of witness - Israil @ Israr Pahelvan Nazirahmed Shaikh dated 31.10.2002 for the first time, the name of petitioner was disclosed as one of the accused in the said offence. Relying upon the said material, the Investigating Officer has arrested the petitioner detenu as an accused on 1.11.2002. The Detaining Authority has also considered all the documents including the arrest of the petitioner, which shows that the detenu was arrested by the police on 1.11.2002 at 21 hours. One of the document is also considered by the Detaining Authority, which is the order passed by the learned Metropolitan Magistrate, Court No. 7, Ahmedabad releasing the petitioner on an application for bail

submitted by the accused dated 2.11.2002 and below the said application, the learned Magistrate has released the accused on bail on furnishing bond of Rs.2500=00 and personal bond of like amount. In the grounds of detention, this fact is highlighted by the Detaining Authority by showing that the detenu was released on bail and he is already released from the custody. The order of detention is passed on the very day i.e. on 2.11.2002. The order of detention was served to the petitioner when the accused was not actually released from the custody and the grounds of detention was served on the detenu by one Shri V.M. Solanki ASI, PCB Ahmedabad City. The satisfaction recorded by the Detaining Authority indicates that the accused is already released on bail in respect of the prohibition act and the Detaining Authority has placed reliance upon the arrest memo dated 1.11.2002 and the bail application made by the accused before the Trial Court dated 2.11.2002 and the order granting bail. Inspite of the fact that the Detaining Authority has while recording satisfaction has considered that the detenu was released on bail and because of the prejudicial activities, it was necessary for him to detain the petitioner, to prevent such prejudicial activities and it was found necessary to detain the petitioner under the PASA Act.

#. Mr. Dave has placed reliance upon the decision of this court in case of RANUBHAI BHIKHABHAI BHARWAD (VEKARIA) VS. STATE OF GUJARAT AND ORS., reported in 2000 (3) GLR, p. 2696. In the said decision, the earlier decision of the Division Bench in the matter of Kalidas C. Kahar Vs. State of Gujart, reported in 1993 (2) GLR, p.1659 was considered. In the aforesaid judgement, inspite of the verification made by the Detaining Authority about the statements given by the witnesses, wherein, the witnesses have apprehended fear at the instance of the petitioner detenu and such satisfaction recorded for claiming privilege by the Detaining Authority under Section 9 (2) of the PASA Act. In para 9 of the said judgement, the Hon'ble Court has observed as under :-

"para - 9. Learned Asstt. Govt. Pleader has submitted that in the instant case, the proposal was made by the sponsoring authority on 27th August 1999. However, he is not in a position to say as to on what date it was received by the detaining authority itself. However, one fact is established that the verification of the witnesses has been made by the detaining authority on 29th August 1999 and

therefore, it must have reached the detaining authority at least on 29th August 1999 and on the next day, i.e. on 30th August 1999, the detention order has been passed. An identical situation had come up before a Division Bench of this Court in the case of Kalidas C. Kahar v. State of Gujarat and ors. reported in 1993(2) GLR 1659. In para 6 of this decision at page 1662, the contention has been dealt with that the detaining authority had wrongly exercised the power under Sec.9(2) of the PASA Act and by such wrong exercise of powers the detenu's right to make a representation under Art.22(5) of the Constitution of India had been infringed. It was also considered that by statements of the witnesses had been recorded on 15th October 1992 and the said statements had been verified by the Supdt. of Police 'C' Division, Baroda City on 16th October 1992. The proposal in the case was made on 16th October 1992 and the order of detention was passed on 17th October 1992. The Division Bench noticed that it was rather curious that the entire bunch of material was supplied by the sponsoring authority at the time of making the proposal and that has been promptly accepted by the detaining authority and passed the order on the next day itself. It has been further observed that at the time of exercising the privilege under Sec.9(2) of PASA, a balance is required to be struck between the public interest on the one hand and the right of the detenu to make a representation under Art.22(5) of the Constitution on the other. If the statements of the witnesses are to be relied on, they must be genuine statements of the real persons. The detenu would like to verify as to whether these persons are fictitious persons or not and/or whether their statements are bogus statements or not? Unless the detenu knows the names and addresses of the persons who have given the statements, he cannot verify the aforesaid facts and if the names and addresses along with the contents of the statements are supplied to the detenu, he can have full opportunity to verify the position and make an effective representation on that basis. As against this, there is a provision under Sec.9(2) carved out on the basis of Art.22(5) of the Constitution which provides that nothing in sub-sec.(1) shall require the authority making such order to disclose facts which it considers to be against the public

interest to disclose. The Division Bench has held that it is the duty of the detaining authority to strike a balance as stated above, that in public interest the names and addresses of the witnesses could not be disclosed. This should not be treated as an idle formality as it affects the public interest on the one hand and the right of the detenu on the other. When that is so, the detaining authority is expected to do some exercise before actually exercising the privilege under Sec.9(2) of the PASA. The Division Bench found in the facts and circumstances of the case before it that the verified statements were also placed before the detaining authority and there was no sufficient time for the detaining authority to examine the possibility of exercising the power under Sec.9(2), as the proposal was made on 16th October 1992 and the order of detention was passed on the following day, i.e. 17th October 1992, nor is there any material to show as to how he examined the necessity of exercising the power under Sec.9(2). Under the circumstances, the Division Bench held that it was a wrong exercise of power under Sec.9(2) which has affected the detenu's right of making an effective representation under Art.22(5) of the Constitution of India and therefore, the continued detention of the detenu is bad and illegal and the impugned detention order was bad and illegal. The facts of the present case are in close proximity to the facts which were considered by the Division Bench in the aforesaid case inasmuch as it has already been pointed out that the statements of the three witnesses in the instant case which were recorded before the Police Inspector on 17th August 1999, 221st August 1999 and 25th August 1999 with regard to the incidents dated 10th July 1999, 13th June 1999 and 26th June 1999 were the material along with the proposal which is said to have been made on 27th August 1999 and it is clear from the record that it was on 29th August 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority had considered the proposal dated 27th August 1999 at any time prior to 29th August 1999 and on 29th August 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had

been made on the respective dates were correct and immediately thereafter on the following day, i.e. on 30th August 1999 the detention order has been passed. Therefore, I find that identical fact situation as was obtaining in the case before the Division Bench is there and it is a case of wrong exercise of power under Sec.9(2) of the Act because the detaining authority had no sufficient time for the purpose of verification of the facts which were required for the purpose of satisfaction to invoke privilege under Sec.9(2). Merely because in the facts before the Division Bench the proposal itself was made on 16th October 1992 and the order was passed on 17th October 1992 and in this case the proposal was made on 27th August 1999, the verification of the statements were made by the detaining authority on 29th August 1999 would not make any difference. Such a difference of a day or two here and there is hardly sufficient to inspire confidence that the detaining authority had the sufficient time for the purpose of verification of the facts which are necessary to lead to invoking the privilege under Sec.9(2) of the Act. In this case also the manner in which the verification has been recorded of the statements made by these three witnesses for the purpose of Sec.9(2) shows that the same has been done only as an empty formality inasmuch as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever the statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege under Sec.9(2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division Bench that it is a case of wrong exercise of power under Sec.9(2) and it is established that in such cases, the wrong exercise of power under Sec.9(2) adversely affects the detenu's right of making an effective representation guaranteed under Art.22(5) of the Constitution of India. This Court quite appreciates in such cases the predicament or the dilemma of the detaining

> authority in as much as, when the action is taken promptly, it is argued that the action has been taken in a hot haste and if the same is taken after lapse of some time, it is said that the action is delayed and therefore, the same stands vitiated. In order to combat this argument, the Division Bench has rightly observed that a balance has to be struck in such cases between the public interest and the right of the detenu to make an effective representation. The detaining authority is, therefore, required to act in such a manner that this balance is maintained. Once the materials are placed before the detaining authority with the proposal by the sponsoring authority, it must have reasonably sufficient time for the purpose of verification of the facts and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege under Sec.9(2) of the Act and also to come to the conclusion that the detenu was required to be detained immediately. In the facts of the present case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August 1999, i.e. on the next day to the date on which the materials were considered by the detaining authority. In this regard, learned counsel for the petitioner had made a reference to several unreported decisions of this Court rendered in different cases on different dates, but I find that it is not necessary for me to deal with all those unreported decisions insofar as this point is concerned, the matter stands fully covered by the Division Bench decision to which the reference has been made hereinabove."

#. Mr. Kogjie, learned AGP has supported the order under challenge. He has also taken me through the affidavit in reply filed by the Detaining Authority in respect of the contentions raised in the petition. It is the say of the Detaining Authority that he has while considering the proposal and material placed before him,

he has called the witnesses personally before him and the witnesses were present before him on 1.11.2002 and the witnesses have expressed their fear and requested that the names and addresses are not disclosed and accordingly, he has claimed privilege as contemplated under Section 9 (2) of the PASA Act.

#. In light of the decision which I have referred earlier, the order of detention deserves to be set aside only on the count of non application of mind. Accordingly, the petition is allowed. The impugned order dated 2.11.2002 passed by the Commissioner of Police, Ahmedabad City is quashed and set aside. The detenu Dipakbhai Govindbhai Parmar is ordered to be released forthwith, if not required in any other case. Rule is made absolute accordingly. Direct Service Permitted.

(D.K.Trivedi, J.)
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